

**REPORT  
OF THE  
UNIFORM COMMERCIAL CODE COMMITTEE  
OF THE  
BUSINESS LAW SECTION  
OF THE STATE BAR OF CALIFORNIA  
ON THE REVISION OF  
UNIFORM COMMERCIAL CODE ARTICLE 7 – DOCUMENTS OF TITLE  
PROMULGATED BY  
THE NATIONAL CONFERENCE OF  
COMMISSIONERS ON UNIFORM STATE LAWS  
AND  
THE AMERICAN LAW INSTITUTE**

**December, 2003**

## **I. INTRODUCTION.**

In August, 2003, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and the American Law Institute (“ALI”) approved revisions to Article 7 (“RA7”) of the Uniform Commercial Code (“UCC”), entitled “Proposed Revisions to Uniform Commercial Code, Article 7 – Documents of Title.” The primary purpose of the revisions is to modify the prior version of Article 7 (“PA7”) to accommodate commercial developments in electronic documents of title. After discussing how adoption of RA7 in California would change the law currently embodied in Division 7 (“CA7”) of the California Uniform Commercial Code (“CUCC”), this Report concludes that adoption of RA7 would modernize California law without adversely affecting existing law and, accordingly, that RA7 should be adopted by California with only limited substantive changes<sup>1</sup>.

This Report discusses, in numerical order, those sections of RA7 which contain significant new provisions or amendments, followed by the proposed conforming amendments to other provisions of the UCC.

## **II. RA7-102, NEW DEFINITIONS.**

### **A. Summary and Analysis.**

Subsections (a)(2), (6), (10), (11) and (12) of RA7-102 add to PA7 new definitions for “carrier,” “good faith,” “record,” “sign” and “shipper.” In addition, RA7-102(a)(5) adds the definition of “delivery order” contained in PA7 that California had failed to enact. RA7-102(a)(8) differs from CA7’s non-uniform definition of “issuer.”

**1. Carrier.** The new definition of “carrier” in RA7-102(a)(2) is a person that issues a bill of lading. While PA7 contained provisions applicable to carriers (which are a type of bailee under Article 7) that are not applicable to other types of bailees,<sup>2</sup> PA7 failed to define the term. The RA7 definition of “carrier” promotes clarity and predictability and therefore should be adopted.

**2. Delivery order.** RA7-102(a)(5) adds to CA7 a new definition of “delivery order” as a “record that contains an order to deliver goods directed to a warehouse, carrier or other person that in the ordinary course of business issues warehouse receipts or bills of lading.” This definition, although similar to the corresponding definition in PA7, includes an addition to permit issuance of delivery orders in electronic as well as tangible form. California failed to enact the prior definition of “delivery order” when CA7 was adopted in 1963 due to fears expressed by the California Bankers Association and the State Bar that doing so might result in dual sets of documents of title for the same goods – bills of lading and delivery orders. However, as the Permanent Editorial Board for the Uniform Commercial Code (“PEB”)

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<sup>1</sup> Consistent with California legislative style, the Committee recommends that RA7 be adopted using the terms “division” and “subdivision” in lieu of the analogous terms “article” and “subsection” used in RA7, deleting the hyphen contained in the section numbers in RA7 and changing references to Article 2A to Division 10.

<sup>2</sup> For example, PA7-307 and 7-308 dealt with the creation, extent and enforcement of carriers’ liens, and PA7-309 dealt with the duty of care of a carrier and the limitation of liability arising from such duty.

remarked in response, these fears failed to take into account the fact that delivery orders as documents of title predated the UCC, so that the risk of dual sets of documents of title if both a bill of lading and a delivery order were issued for the same goods was nothing new. The PEB pointed out that since delivery orders were already in use, the UCC should include rules governing, rather than ignoring, that use.<sup>3</sup> RA7 contains new provisions specifically applicable to delivery orders that now make adoption of a definition in California advisable.<sup>4</sup>

3. **Good faith.** RA7-102(a)(6)'s definition of "good faith" requires the observance of reasonable commercial standards of fair dealing. Although broader than the definition of "good faith" presently applicable to Article 7, the new definition is consistent with the definition of "good faith" found in Revised Articles 3, 4 and 9. (Note, however, that Revised Article 5 retained the subjective definition of "good faith" as "honesty in fact in the conduct or transaction concerned.") Although Division 1 of the CUCC, which by its terms, would apply to transactions governed by RA7, currently contains the narrower definition of "good faith" as "honesty in fact," revisions to Article 1 of the UCC ("RA1") that have not yet been adopted in California would expand the definition of "good faith" to include a requirement of the observance of reasonable commercial standards of fair dealing. If RA1 is adopted in California prior to or contemporaneously with the adoption of RA7, it would not be necessary to adopt RA7 §7-102(a)(6)'s definition of "good faith." If RA1 is not adopted, RA7-102(a)(6) should be adopted because, as the Committee has previously stated<sup>5</sup> and consistent with the revisions of Articles 3, 4 and 9, it is advisable to bring considerations of commercial reasonableness to bear on determinations of good faith.

4. **Issuer.** With one exception, RA7-102(a)(8) is substantively the same as the same section in PA7. It adds to the definition of "issuer" that the issuer of an unaccepted delivery order is "the person that orders the possessor of such goods to deliver." This clause was not included in CA7102 due to the position taken by the California legislature in 1962 that delivery orders should not be covered by the rules governing other documents of title. That position was based on the erroneous assumption that delivery orders were not already treated in commercial practice as documents of title.<sup>6</sup> Making this addition at this time is recommended in order to avoid the imposition of the obligations of an issuer on a bailee prior to its acceptance of the delivery order.

5. **Person entitled under the document.** RA7-102(a)(9) contains the definition of "person entitled under the document" previously set forth in PA7-403. The definition has been modified from that contained in PA7-403 solely to make the definition medium-neutral and should be adopted.

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<sup>3</sup> See California Code Comment to Commercial Code §7102.

<sup>4</sup> RA7-102(a)(8) adds to the definition of "issuer" the person ordering delivery, in the case of an unaccepted delivery order. In addition, RA7-502(a)(4) provides that a bailee's obligation under a delivery order accrues only upon acceptance of the order. RA7-503(b) provides for special limitations on title to goods based upon an unaccepted delivery order. These provisions were present in PA7 but were not adopted in California.

<sup>5</sup> See Report of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California on Revisions to Article 1, March 2003, p. 7.

<sup>6</sup> See "Delivery order," *supra*.

6. **Record.** RA7-102(a)(10) adds a definition of “record” which was not previously defined in PA7 or CA7. “Record” is defined by RA7 as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” The new definition is substantially identical to the definitions of “record” in §9-102 of Revised Article 9 (§9102 of the CUCC), in the Electronic Signatures in Global and National Commerce Act (“eSign”), 15 U.S.C. §7006, and in RA1. As a result, if RA1 is adopted in California prior to or contemporaneously with the adoption of RA7, adoption of §7-102(a)(10) in California would be unnecessary. However, if RA1 is not so adopted, or is adopted without the definition of “record” described above, RA7-102(a)(10) should be adopted. Adoption of the revised definition of “record” is recommended in order to permit and foster the development of electronic documents of title.

7. **Sign.** RA7-102(a)(11) adds a new definition of “sign.” The term is defined as “to attach to or logically associate with a record an electronic sound, symbol or process or to execute or adopt a tangible symbol, with the present intent, in either case, to authenticate or adopt a record.” Although not identical, the definition is similar to the definition of “authenticate” contained in Revised Article 9. It also is an improvement on the definition of “electronic signature” contained in eSign, which latter definition uses the phrase “intent to sign,” rather than “present intent...to authenticate or adopt” a record. The new provision permits and fosters the development of electronic documents of title by authorizing a method of adopting or authenticating a document not dependent upon a writing and is recommended for adoption.

8. **Shipper.** RA7-102(a)(12) adds a new definition of “shipper” as “a person that enters into a contract of transportation with a carrier.” A shipper is a type of bailee under PA7 and RA7 to which certain provisions apply that are not applicable to bailees in general<sup>7</sup>. The term was not defined in PA7. Adoption of the RA7 definition of “shipper” is recommended as it promotes clarity and predictability.

## **B. Committee Recommendations.**

The Committee recommends adoption of the proposed definitions in California for the reasons stated above.

## **III. RA7-103, RELATION TO OTHER LAWS.**

### **A. Summary and Analysis.**

RA7-103 makes several modifications to conform to recent legal developments in other areas of the law. Currently CA7103 makes the provisions of Division 7 subject to federal treaties and statutes and state “regulatory statutes” and any “tariff, classification or regulation filed or issued pursuant” to a “state regulatory statute.” A comment characterizes “state regulatory statutes” as including, without limitation, “those fixing or authorizing a commission to

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<sup>7</sup> PA7-301 provides in part that a shipper guarantees to the issuer the accuracy at the time of shipment of certain information as to goods loaded by the shipper, and indemnifies the issuer against damage caused by inaccuracies in such information.

fix rates and prescribe services, authorizing different charges for goods of different values, and limiting liability for loss to the declared value on which the charge was based.”

Warehouse charges are no longer regulated by the California Public Utilities Commission, and shipping rates have also been deregulated with the abolition of the Interstate Commerce Commission. Accordingly, references to tariffs and filed classifications previously contained in §7-103, as well as parallel references in §7-309 and other sections of RA7, have been deleted. RA7-103(b) makes it clear that any laws regulating a bailee’s business continue to apply unless the subject is specifically treated in RA7.

RA7-103 also adds provisions to CA7 addressing the relationship between RA7 and eSign (RA7-103(c)) and the relationship between RA7 and the Uniform Electronic Transactions Act (“UETA”), which in California is referred to as “CETA” (RA7-103(d)). eSign expressly permits a state to modify, limit or supersede its provisions by statute. In accord with this mandate, the drafters of RA7 improved the definition of “sign” in RA7-102 over the definition of “electronic signature” in eSign (as well as UETA and CETA) by substituting the medium-neutral phrase “intent to authenticate or adopt a record” for the phrase “intent to sign” used in the other laws to describe the required intent of the signer. RA7-103(d) provides that RA7 governs to the extent of any conflict with UETA.

#### **B. Committee Recommendations.**

For the reasons described above, RA7-103 would effectuate desirable changes in California law, and it is recommended that it be adopted.

### **IV. RA7-104, CLARIFYING THE RULES REGARDING WHEN A DOCUMENT IS NON-NEGOTIABLE.**

#### **A. Summary and Analysis.**

RA7-104(a) maintains the general principle applicable under PA7 that a document of title is negotiable if, by its terms, the goods subject to the document are to be delivered to bearer or to the order of a named person. Any document of title that does not meet the foregoing requirement is non-negotiable. The distinction between negotiable and non-negotiable documents of title is significant in that the holder of negotiable documents may acquire more rights than its transferor possessed. RA7-104(a) would make several salutary changes in California law that would facilitate or be consistent with current commercial practice, and its adoption is recommended.

RA7-104(c) would change PA7 so as to permit an issuer of a document of title to “opt out” of negotiability by placing on the document at the time of issuance a conspicuous legend to the effect that the document is non-negotiable. Consistent with prior law in the converse situation, RA7-104 provides that designating a document of title as negotiable does not automatically make it so. RA7-104 would enhance the flexibility and certainty of issuers of documents by giving them a mechanism for ensuring that documents are non-negotiable.

RA7-104(a) also deletes a provision of CA7 treating a document of title as negotiable if it runs to a named person or assigns to the extent that such a practice is recognized in overseas trade. This provision is unnecessary in light of current commercial practice.

CA7104(3) contains a provision preserved from the former Uniform Warehouse Receipts Act and Uniform Bills of Lading Act and not contained in PA7 that required a non-negotiable warehouse receipt or bill of lading to be “earmarked,”<sup>8</sup> *i.e.*, conspicuously marked “non-negotiable”. The provision further provides that, in case a bailee fails conspicuously to mark such a document as non-negotiable, a holder of the document who purchased it for value supposing it to be negotiable may, at the holder’s option, treat the document as imposing upon the bailee the same liabilities he would have incurred had the document been negotiable. While RA7-104 requires a legend to be conspicuous if the issuer wishes to avail itself of the protections of §7-104(c), it does not require a conspicuous legend for a document in fact to be non-negotiable, nor does it give the holder the option to treat the document as negotiable where the legend was omitted or not conspicuous. CA7104(3) contained a trap for the unwary, particularly for issuers from outside of California unaware of California’s non-uniform requirement to avoid inadvertently being treated as the issuer of a negotiable document, and, accordingly, its repeal in connection with adoption of RA7 is recommended.

**B. Committee Recommendation.**

The changes in California law that would be effected by adoption of RA7-104(c) would be beneficial in that they would simplify the determination of whether a document of title is negotiable and permit issuers to elect to confer non-negotiable status on a document by an easily identifiable method. The Committee further believes that, given the simplicity of the rules provided in RA7-104(c) and risks of non-uniformity in the area, there is no need to retain the non-uniform provisions contained in CA7104 and recommends that RA7-104(c) be adopted as proposed.

**V. RA7-105, REISSUANCE OF A TANGIBLE DOCUMENT OF TITLE IN AN ELECTRONIC MEDIUM.**

**A. Summary and Analysis.**

**1. RA7-105.**

RA7-105 sets forth minimum standards for substituting an electronic document of title for an already issued tangible document, and vice versa. §7-105(a) and (c) provide that if those standards are met, the issuer “may” accede to the request of a person entitled under the document to reissue the document in a different medium. By using the word “may,” it leaves to the issuer’s discretion whether to reissue a document in a different medium, even if the minimum standards are met.

RA7-105 does not address what is required for an issuer to substitute one electronic or tangible document of title for another in the same medium. RA7-105 also does not preclude an issuer from establishing additional or higher standards for issuance of substitute documents in another medium.

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<sup>8</sup> See “The Uniform Commercial Code: a Special Report by the California State Bar Committee on the Commercial Code,” 37 Journal of the State Bar of California 117, 181 (1962) (“Special Report”).

Subsections (a) and (c) articulate the minimum conditions under which an issuer may issue a document of title in a different medium. Subsection (a) provides that an issuer of an electronic document may issue a tangible document in lieu thereof, if the person entitled under the electronic document surrenders control of the document to the issuer, and the tangible document when issued contains a statement that it is issued in substitution for the electronic document. Subsection (c) governs issuance of an electronic document in substitution for a tangible one, and is largely parallel to subsection (a), differing only by the substitution of the concept of possession for that of control required under subsection (a). Subsections (b) and (d) provide that once the substitute document is issued, the prior document ceases to have any effect or validity, and the person that procured issuance of the substitute document warrants to all subsequent persons entitled under the substitute document that the warrantor was a person entitled under the prior document when the warrantor surrendered the prior document of title to the issuer.

If the minimum requirements specified in subsections (a) or (c) are not met, the substitute document will not be given effect or validity, and the original document of title continues to be effective and valid. However, if the minimum requirements imposed by this section are met, in addition to any other requirements that the issuer may impose, the substitute document will be the document that is effective and valid. If reissuance results in overissue, *i.e.*, multiple documents of title covering the same goods, or if a duplicate document fails to include a conspicuous notation that it is a duplicate, then under RA7-402 the issuer is liable for any resulting damages.

In evaluating RA7-105, the Committee has some concern that the provision fails to address reissuance of documents in the same medium. Because RA7-105 does not address requirements for reissuance in the same medium, and does not specifically give the issuer discretion to decline a request to reissue documents in the same medium, an erroneous inference might be drawn that the rules governing reissuance in the same medium are somehow different.

The Committee is particularly concerned that the warranty provisions of RA7-105(b)(2) and (d)(2) conflict with the policy of medium neutrality espoused in UETA, adopted in Cal. Civil Code §§1633.1 *et seq.* A person obtaining reissuance of a document of title in a different medium warrants under RA7-105(b)(2) and (d)(2) that the warrantor was a “person entitled” under the document when the document (in the case of a tangible document) or control of the document (in the case of an electronic document) was surrendered to the issuer. Yet, a person obtaining reissuance of a document of title in the same medium makes no such warranties. There does not appear to be any compelling rationale for this distinction, apart from fears apparently expressed by persons in the warehouse industry that reissuance of warehouse receipts in an alternative medium would cause confusion not presently encountered when reissuing them in the same medium.<sup>9</sup>

Notwithstanding the foregoing, there is no indication that the failure of existing law to set forth standards for issuance of substitute tangible documents of title has impeded the usefulness

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<sup>9</sup> Private communication between Prof. Arnold S. Rosenberg, Thomas Jefferson School of Law, and Prof. Linda Rusch, Hamline School of Law, Co-Reporter of the Drafting Committee of RA7, August 6, 2003.

of such documents of title or the conduct of trade. That, together with the Committee's view that uniformity among jurisdictions is a desirable goal, leads to the Committee's conclusion that RA7-105 should be adopted in the form proposed, albeit with an additional comment, set forth in part B of this Section below.

## **2. CA7105.**

Adoption of RA7 would effectively repeal CA7105 by replacing it with a provision addressing a different subject matter, as discussed above. CA7105 is identical to PA7-105 except for the use of the term "chapter" in lieu of "part", in accordance with California statutory usage.

While four of the parts of Article 7 apply to all types of documents of title, Parts 2 and 3 of PA7 (and Chapters 2 and 3 of CA7), respectively, deal separately with warehouse receipts and bills of lading. PA7-105 provides that the omission from either Part 2 or Part 3 of a provision corresponding to a provision of the other part does not imply that a corresponding rule of law is not applicable. At the time of its initial promulgation, Article 7 synthesized and modified comprehensive legal rules which previously had been set forth separately in the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act, each of which had generated a body of case law, and around each of which industry custom and practice had developed. The drafters of PA7 were concerned that incorporation of both of the foregoing uniform acts into Article 7 could be interpreted by a court as incorrectly implying disapproval of certain of these case law developments and/or industry customs and practices. The Official Comments to PA7-105 cite two examples: the possible common law right of indemnity a warehouse may have, corresponding to the right of a carrier in PA7-301(5) and the possible contractual security interest a carrier might obtain, corresponding to that available to warehouses under PA7-209(2). However, experience since the initial promulgation of Article 7, as well as the lack of reported cases addressing or referring to PA7-105 during that period, casts considerable doubt upon the need for the rule against negative construction articulated in PA7-105.

The Committee believes that the need for PA7-105 and CA7105 no longer exists, and that it should be repealed as part of the adoption of RA7.

## **B. Committee Recommendation.**

For the reasons set forth above, the Committee recommends that RA7-105 be adopted in California in the form proposed, and that current CA7105 be repealed. However, to address some of the concerns set forth above, a new Comment 4 should be added to RA7-105 as follows, for the guidance of practitioners:

“4. Current law governing reissuance of documents of title in the same medium, whether reissuance of a tangible document of title in place of another tangible document of title or reissuance of an electronic document of title in place of another electronic document of title, remains unchanged. A prudent issuer will refuse to reissue a document of title in any medium unless it obtains possession or control of, and cancels, the original document of title and includes a



statement in the substitute document of title that it was issued in substitution for the original document. Regarding missing documents of title, *see* §7-601.”

## **VI. RA7-106, CONTROL OF ELECTRONIC DOCUMENTS OF TITLE.**

### **A. Summary and Analysis.**

RA7-106 is new. The section has been added to define control as it relates to an electronic document of title. Pursuant to RA7-106 and the proposed accompanying revision to UCC §9-314 (which makes express reference to electronic documents, which include electronic documents of title), a security interest in an electronic document of title may be perfected by control.

Language for RA7-106 is derived from UETA §16 and §9-105.

Subsection (a) of RA7-106 sets forth a general test for control. Under that subsection, a person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to whom the electronic document was issued or transferred.

Subsection (b) of RA7-106 provides a safe harbor which, if satisfied, results in control under the general test of subsection (a). Satisfaction of the safe harbor is dependent upon whether the document is created, stored, and assigned in such a manner that six tests are met:

1. There must be a single authoritative copy of the document in existence which is unique, identifiable, and, except as provided below, unalterable.

2. The authoritative copy must identify the person asserting control as either the person to whom the document was issued, or if the authoritative copy indicates that the document has been transferred, the person to whom the document was most recently transferred.

3. The authoritative copy must be communicated to and maintained by the person asserting control or its designated custodian.

4. Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control.

5. Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy.

6. Any amendment of the authoritative copy must be readily identifiable as authorized or unauthorized. Section 9-105 utilizes the same test as subsection (b), but does not include the general test of RA7-106(a).

### **B. Committee Recommendation.**

The Committee recommends that RA7-106 be adopted in California. This section is a key element in the effort to expand Article 7 to cover electronic documents of title.

## **VII. RA7-202, FORM OF WAREHOUSE RECEIPT.**

### **A. Summary and Analysis.**

RA7-202 updates PA7-202 to accommodate electronic commerce and to reflect modern style. Specifically, the reference in the current law to “consecutive number of the receipt” has been changed to “the unique identification code of the receipt.” Currently, PA7-202 provides that a warehouse receipt need not be in any particular form but, nonetheless, goes on to specify certain information, including the consecutive number of the receipt,<sup>10</sup> which, if not included in the warehouse receipt, gives rise to a cause of action against the warehouse for any harm caused by the omission.

RA7-202 also would modify a non-uniform provision found in CA7202. PA7-202(2)(e) provides, “The rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a non-negotiable receipt;” but CA7 goes on to add,

“...and except that where goods are stored in a public utility warehouse having a lawful tariff on file with the Public Utilities Commission, a statement that the rate of storage and handling charges are as provided in such tariff is sufficient.”

According to the California Code Comments, this change was made because California, unlike most states, then regulated the business of public warehousing and required rates and charges to be on file with the Public Utilities Commission. CA7202(e) permits rates and charges on file with the Public Utilities Commission to be incorporated in the warehouse receipt by a reference to such established charges.

### **B. Committee Recommendation.**

Adoption of RA7-202 is recommended in California in order to accommodate electronic documents and to reflect modern stylistic preferences. Since the business of public warehousing is no longer regulated in California by the Public Utilities Commission, the non-uniform term

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<sup>10</sup> Information, the omission of which from a warehouse receipt can give rise to liability on the part of the warehouse, includes the following in PA7:

“(a) [T]he location of the warehouse where the goods are stored; (b) the date of issue of the receipt; (c) the consecutive number of the receipt; (d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order; (e) the rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a non-negotiable receipt; (f) a description of the goods or of the packages containing them; (g) the signature of the warehouseman, which may be made by his authorized agent; (h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and (i) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest (Section 7-209). If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.”

currently appearing in CA7-202 is no longer appropriate, and, accordingly, it is recommended that RA7-202 be adopted without modification.

#### **VIII. RA7-204, DUTY OF CARE; CONTRACTUAL LIMITATION OF WAREHOUSE'S LIABILITY.**

##### **A. Summary and Analysis.**

RA7-204 makes only one material change in PA7-204. Both PA7-204 and RA7-204 make a warehouse liable for damages for loss or injury to the goods caused by the warehouse's failure to exercise reasonable care, but permit the warehouse to limit its liability for those damages to a specified valuation of the goods by including a term to that effect in the warehouse receipt or storage agreement. Subsection (2) provides, among other things, that a contractual limitation of liability is ineffective if the warehouse converted the goods to its own use. RA7-204 eliminates the requirement in PA7-204 (CA7204 contains substantially the same requirement), that, to be effective, the limitation of liability specify a dollar valuation per item or per unit of weight. Per item valuations are cumbersome and are no longer industry practice.

In view of the deregulation of the warehouse industry, RA7-204 also eliminates from PA7-204 (CA7204 contains substantially the same provision) references to tariffs governing warehouse charges.

##### **B. Committee Recommendation.**

It is recommended that RA7-204 be adopted in California to eliminate requirements that are no longer industry practice.

#### **IX. RA7-206, TERMINATION OF STORAGE AT WAREHOUSE'S OPTION.**

##### **A. Summary and Analysis.**

RA7-206 preserves prior law under which a warehouse may give the person on whose account goods are held, and any other person known to claim an interest in the goods, 30 days' notice to pay all charges and remove the goods, or a different period of notice if provided in the document of title.

CA7206(4) contains a non-uniform provision conditioning the warehouseman's<sup>11</sup> duty to deliver goods on payment of any amount necessary to satisfy the warehouseman's lien and reasonable expenses. RA7-206(d) would require a warehouse to deliver the goods to "any person entitled to them under this article" upon "due demand made at any time before sale or other disposition under this section."

Legislative history indicates that the non-uniform provision in CA7 was added in an abundance of caution notwithstanding the right to liens afforded to warehouses under CA7209. RA7-403, PA7-403 and CA7403 all require a person claiming goods covered by a document of

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<sup>11</sup> RA7 replaces the antiquated word "warehouseman" with the word "warehouse" wherever it appeared in PA7.

title to satisfy the bailee's lien upon request or if the bailee is prohibited by law from delivering the goods until charges are paid. Comment 4 to CA7403 makes it clear that to refuse delivery due to nonpayment of charges, the bailee must request payment of the amount of its lien when asked to deliver, and if payment is not forthcoming, the bailee may decline to deliver the goods.

In view of CA7403 and Comment 4, there seems to be little need for a non-uniform California provision in CA7206.

**B. Committee Recommendation.**

The Committee recommends that RA7-206 be adopted in California.

**X. RA7-209, WAREHOUSE'S LIEN.**

**A. Summary and Analysis.**

PA7-209 provides for a statutory lien in favor of a warehouse with respect to goods covered by a warehouse receipt. RA7-209 expands the circumstances under which such a lien arises to include where goods are covered by a storage agreement, even if a warehouse receipt covering the goods has not been issued. As described below, the effect of this change is likely to be less significant in California than in uniform jurisdictions as a result of a non-uniform provision in CA7209(1) providing that the lien arises whenever goods are "deposited" by the bailor<sup>12</sup>. This non-uniform provision was adopted in California because it was a common industry practice in California at the time to store goods without issuing warehouse receipts.<sup>13</sup>

RA7-209(a) may effect a slight, but not significant, narrowing of the circumstances under which a warehouse lien arises under California law in the absence of a warehouse receipt. If goods are deposited with a warehouse<sup>14</sup>, the lien arises under CA7209(1) without regard to whether a storage agreement exists or whether the goods are covered by a warehouse receipt. Under RA7-209 the lien arises only if a storage agreement exists or a warehouse receipt has been issued.<sup>15</sup> RA7-209 would not afford lien protection to a warehouse with whom goods are deposited if no storage agreement covers those goods. It is anticipated that in most commercial situations where a bailor deposits goods with a warehouse, those parties would enter into a storage agreement relating to such goods.

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<sup>12</sup> The California non-uniform provision continued the rule of the former Uniform Warehouse Receipts Act, embodied in California in former Cal. Civ. Code Section 1858.50(a), which provided that such a lien arose by operation of law whether or not a receipt was issued by the warehouse.

<sup>13</sup> See Sixth Progress Report to the Legislature by the Senate Fact Finding Committee on the Judiciary (1959-1961), "Part 1, The Uniform Commercial Code; Chapter VIII, Special Comments on Article 7," pp. 617-618.

<sup>14</sup> The term "deposit" in CA7209(1) is not defined. In theory, under CA7 a thief could "deposit" stolen goods with a warehouse and thereby create a lien in the goods in favor of the warehouse under CA7209(1). Under RA7-209(a), use of the word "deposit" is eliminated. Instead, the lien only would apply to goods covered by a warehouse receipt or storage agreement. Therefore, in the case of deposit by a thief, under RA7-709(c)(1) the lien would be ineffective as against the owner, and the thief could confer no rights in the goods. It appears that the same result would obtain under the 1967 amendment to CA7 §7503, which employs the same language as §2-709(c)(1).

<sup>15</sup> The term "storage agreement" is not defined in RA7 and presumably would include any agreement to store goods, whether verbal, electronic or in writing. It also would include a master storage agreement without regard to whether a warehouse receipt is issued for specific goods. RA7-209, Comment 6.

Other changes in RA7 would affect the amount of the warehouse's lien as compared to existing California law in two ways.

First, under CA7209(a) the amount of the warehouse's lien as to specified goods includes any unpaid charges and expenses in relation to different goods deposited with the same warehouse on the account of the same person -- the so-called "general" warehouse lien. This general warehouse lien, not incorporated in PA7, was incorporated in CA7 to address the prevailing industry practice in California under which warehouse receipts were not uniformly issued. Under RA7, as in PA7, the general warehouse lien does not arise automatically. RA7-209(a) provides that charges and expenses in relation to other goods are not a lien on the goods covered by a warehouse receipt or storage agreement unless the warehouse receipt or storage agreement discloses that a lien is claimed for charges and expenses in relation to other goods. In theory this provision might help prevent unexpected charges from appearing on an invoice when the bailor attempts to obtain delivery of stored goods. The warehouse's lien on the specific goods covered by the warehouse receipt or storage agreement would remain unaffected by RA7 as to charges with respect to those goods, including "charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law."

Second, CA7209(2) permits the warehouse to reserve a security interest in goods under Article 9 against the bailor for other, non-storage charges, such as money advanced and interest, whether or not a warehouse receipt is issued. However, CA7209(2) provides that if a warehouse receipt is issued, such a security interest is ineffective against third parties without notice unless the maximum amount thereof is conspicuously specified on the receipt. Under CA7209(2), if no warehouse receipt is issued or no amount is specified, the warehouse's security interest would still be effective as against the bailor. PA7 and RA7-209(b) do not provide for the warehouse to have a security interest in stored goods for other, non-storage charges unless a maximum amount is specified on the warehouse receipt. The concern expressed by the State Bar in 1962 which led to the non-uniform CA7 provision was that the exact amount of non-storage charges to be covered by a lien on the goods might not be known when the warehouse receipt was issued.<sup>16</sup>

In all other respects RA7 is consistent with CA7209. A non-uniform provision in the original text of CA7503, referred to in CA7209(3)(a), was eliminated in 1967.

## **B. Committee Recommendations.**

The Committee recommends that RA7-209 be adopted in California.

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<sup>16</sup> *Ibid.*

**XI. RA7-301 AND 7-302, LIABILITY FOR NON-RECEIPT OR MISDESCRIPTION; THROUGH BILLS OF LADING.**

**A. Summary and Analysis.**

1. **Section 7-301.** The underlying rule of PA7-301 and CA7301 is that a consignee of a non-negotiable bill of lading that has given value in good faith, or a holder to which a negotiable bill has been duly negotiated, may recover from the issuer of the bill any damages caused by misdescription of the goods, or by misdating of the document, if the consignee or holder relies on the description of the goods or the date set forth in the document. However, the provision sets forth a number of broad means by which an issuer may avoid liability for such damages in certain circumstances, *e.g.*, by including words such as “shipper’s weight, load and count” in the bill of lading. PA7-301 and CA7301 also provide that a shipper must indemnify an issuer against damages caused by inaccurate information furnished by the shipper.

The principal change embodied in RA7-301 is to make the obligations of the issuer of a bill of lading applicable to all issuers, rather than merely those who are common carriers. PA7-301(b) (and the corresponding subsection of CA7301) provide that, if goods are loaded by an issuer of a bill of lading that is a common carrier, the issuer must count packages of goods in the case of package freight and must ascertain the kind and quantity in the case of bulk freight. PA7-301(c) (and the corresponding subsection of CA7301) provide that when bulk freight is loaded by a shipper that makes adequate weighing facilities available to an issuer that is a common carrier, the issuer must ascertain the kind and quantity of the goods within a reasonable period of time after receiving a written request from the shipper to do so. Under RA7-301, these obligations will apply to all issuers.

Other changes from prior law in RA7-301 are primarily for purposes of clarity and style or to utilize updated terminology, such as the term “record” in place of “writing” and the current industry term “goods” in place of “freight.”

2. **Section 7-302.** PA7-302 sets forth two basic rules. The first is that the issuer of a through bill of lading or other document that contemplates performance by agents of the issuer or by connecting carriers is liable for breach of the contract of carriage by any such agent or connecting carrier. The second is that each such agent or connecting carrier is responsible for performing in accordance with the bill of lading while the goods in question are in its possession.

The proposed changes to PA7-302 are not substantive and are solely for purposes of clarity and style or, in one instance, to utilize current industry terminology (*e.g.*, “performing carrier” rather than “connecting carrier”).

**B. Committee Recommendations.**

The Committee recommends that RA7-301 and 7-302 be adopted in California. However, the Committee recommends that the word “guarantees” after the reference to shipper at the beginning of subsection (e) of RA7-301 should be deleted and replaced by “warrants.” The latter term avoids potential confusion with the concept of guarantee as a promise to perform

an obligation of another, and is consistent with Code usage in other articles. The Committee notes also that a minor typographical error occurs at the end of subsection (c)(1) of RA7-302, and that this error should be corrected by changing “, and;” to “; and”.

## **XII. RA7-307, CARRIER’S LIEN ON PROCEEDS.**

### **A. Summary and Analysis.**

PA7-307 and CA7307 provide that a carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date when it received the goods and for expenses of preservation incident to transportation and expenses of sale of the goods.

Under PA7-307 and CA7307, the carrier’s lien does not extend to proceeds of the goods covered by the bill of lading. Accordingly a carrier, to preserve and enforce its lien, may be forced to refuse to release the goods to the consignee or to the consignee’s customer, even where proceeds of the goods would be sufficient to satisfy the carrier’s unpaid charges. RA7-307 addresses this problem by extending the carrier’s lien to proceeds of the goods in the carrier’s possession.

### **B. Committee Recommendation.**

The Committee recommends that RA7-307 be adopted in California. The proposed amendment would facilitate the conduct of commercial transactions where a carrier’s charges are in dispute by providing a mechanism whereby the carrier’s interests in payment for its services are protected, without disrupting the flow of commerce.

## **XIII. RA7-403, OBLIGATION OF WAREHOUSE OR CARRIER TO DELIVER; EXCUSE.**

### **A. Summary and Analysis.**

CA7403(1)(b) contains a non-uniform provision placing the burden on the person entitled under the document to establish negligence of the bailee in case of failure to deliver the goods. The provision was intended to overrule the California Supreme Court’s decision in George v. Bekins Van & Storage Co., 33 Cal.2d 834 (1949), which held it was the warehouseman’s burden to prove a lawful excuse for non-delivery.

RA7-403(a), if adopted in California, would eliminate the non-uniform provision in CA7403(1)(b) and place the burden back on the bailee to establish non-liability in cases of non-delivery. RA7-403(a) requires the bailee to deliver the goods “unless and to the extent the bailee establishes” one of a list of exceptions. One of the exceptions, in RA7-403(a)(2), is “damage to or delay, loss or destruction of the goods for which the bailee is not liable.” Comment 3 to RA7-403 characterizes the latter exception as “a cross reference to all the tort law that determines the varying responsibilities and standards of care applicable to commercial bailees, and states that “the allocations of the burden of going forward with the evidence and the burden of proof [are left] to the procedural law of the various states,” However, if RA7-403 were adopted in California, the non-uniform provision in CA7403(1)(b) overruling George v. Bekins Van &

Storage Co., *supra*, would be superseded, and the burden would shift back to the bailee to establish non-liability.

Placing the burden on the bailee to establish its non-liability for damage to, loss or destruction of the goods makes sense. Usually the evidence regarding the reason for non-delivery will be in the possession of the bailee, not the bailor. If goods are delivered to the wrong person, the bailee has greater access to information regarding the delivery. If the goods have been damaged, lost or destroyed, the bailee is more likely to have access to information and evidence concerning these circumstances.

In interstate and international common carrier cases involving goods shipped under bills of lading, federal law places the burden of proof on the carrier to show excuse. “The carrier bears a heavy burden of proof akin to *res ipsa loquitur* because it has peculiarly within its knowledge the facts which may relieve it of liability.” Kaiser Aluminum & Chemical Corp. v. Illinois C. G. R. Co., 615 F.2d 470, 474 (8th Cir. 1980), citing the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §20. *See also* 49 U.S.C. §80113 (carrier liable for non-receipt of goods absent excuse). *Cf.* Annotation, “Carrier’s Issuance of Bill of Lading or Shipping Receipt, Without Notation Thereon of Visible Damage or Defects in Shipment, as Creating Presumption or Prima Facie Case of Good Condition When Received,” 33 ALR2d 867.

There is no apparent reason why the burden of proof should be reversed simply because a shipment was to be delivered within the borders of the State of California.

While the Committee recommends adoption of RA7-403, Comment 3 to RA7-403 should be modified by deleting the sentence that reads, “The bracketed language found in former Section 7-403(1)(b) has been deleted thereby leaving the allocations of the burden of going forward with the evidence and the burden of proof to the procedural law of the various states.” This sentence is misleading to the extent that it suggests that allocation of the burden of proof is left undetermined by RA7-403. By explicitly placing the burden on the bailee to “establish” an excuse for non-delivery, RA7-403 allocates the burden of proof on the bailee. This is evident from Article 1-201(a)(8), which equates the “burden of establishing” a fact with the burden of persuading the trier of fact of the existence of that fact by a preponderance of the evidence.

The sentence in Comment 3 is also inaccurate in referring to the burden of proof as a “procedural” matter. “Under...Erie v. Tompkins, 304 U.S. 64 (1938)], presumptions (and their effects) and burden of proof are ‘substantive’” rather than procedural. Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959), and cases cited therein. If the burden of proof were procedural, a federal court sitting in its diversity jurisdiction theoretically could fashion its own federal rule on the burden of proof of excuse for non-delivery and ignore RA7-403.

## **B. Committee Recommendation.**

The Committee recommends adoption of RA7-403. However, Comment 3 to that section should be modified by deleting the sentence that reads, “The bracketed language found in former Section 7-403(1)(b) has been deleted thereby leaving the allocations of the burden of going forward with the evidence and the burden of proof to the procedural law of the various states.”



#### **XIV. RA7-501, NEGOTIATION AND DUE NEGOTIATION OF DOCUMENTS OF TITLE.**

##### **A. Summary and Analysis.**

The primary substantive change in RA7-501 is the addition of subsection (b), which sets forth what constitutes negotiation and due negotiation of electronic documents of title. RA7-501 (b)(1) provides that if a negotiable electronic document of title runs to the order of a named person or to bearer, it can be negotiated by delivery. Assuming the adoption of either RA1-201 or the conforming amendments to Article 1 that accompany RA7, delivery means, with respect to an electronic document of title, voluntary transfer of control. Indorsement is unnecessary; the control concept as applied to negotiable electronic documents of title is the substitute for both possession and indorsement as applied to negotiable tangible documents of title.<sup>17</sup> RA7-501(b)(2) provides that if the document's original terms run to the order of a named person and the person has control of the document the effect is the same as if the document had been negotiated. The effect of subsection (b)(2) is to make explicit that a negotiation results from a delivery to a buyer to whose order the document has been taken by the person making the bailment.

Under RA7-501, due negotiation of either a tangible or electronic document of title occurs when a document is negotiated, in the manner required by the applicable subsection, to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that one of two exceptions apply. The first such exception applies if it is established that the negotiation is not in the regular course of business or financing. The second such exception applies if it is established that the negotiation involves taking delivery of the document in settlement or payment of a monetary obligation. These two exceptions are sometimes referred to herein as the "non-regular-course exceptions". Under RA7-502, upon due negotiation of a document of title, the holder acquires title to both the document and the goods, and the bailee that issued the document becomes obligated to the holder to hold or deliver the goods free of any defense or claim by the bailee except those arising under the terms of the document or under Article 7.

Adoption of RA7-501 would harmonize California law with respect to the non-regular-course exceptions with the laws of other states. In 1963, California adopted a non-uniform version of §7501(4) which deleted the non-regular-course exceptions. Under existing California law, negotiations may constitute "due negotiations" even when occurring outside of the regular course of business or financing or involving receiving the document in settlement or payment of a money obligation.

The California non-uniform version of §7501(4) was based on the concern of Professors Harold Marsh, Jr. and William D. Warren, expressed in their report to the California legislature in 1962, that institutions dealing with documents of title, including those taking security interests in such documents, would have to determine at their peril whether the transaction was in the regular course, and could lose their status as a holder in due course if they made the wrong

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<sup>17</sup> See RA7-106.

determination. Professors Marsh and Warren also questioned why a person who takes a document in settlement or payment of an obligation would be denied holder in due course status when a person who takes the same document as security for an obligation, even a preexisting obligation, would be granted that status.

RA7-501(a)(5) and (b)(3) eliminate the non-uniform California provision and exclude from the definition of “due negotiation” non-regular-course negotiations and negotiations in settlement or payment of a money obligation. In practical terms, this means that, in such transactions, title to the document (whether tangible or electronic) and the goods covered by it are not automatically transferred upon negotiation of the document, and that the holder of the document is not entitled to rights under, and is potentially subject to the defenses specified in, RA7-502(b), such as misrepresentation, fraud, mistake, duress, loss, theft and conversion.

The arguments in favor of the non-regular-course exceptions are essentially the same as those to which Professors Marsh and Warren responded in 1962. These arguments can be summarized as follows: holders through due negotiation are permitted to acquire rights in some cases greater than those of their transferor in order to “make possible the speedy handling of that great run of commercial transactions which are patently usual and normal.”<sup>18</sup> In non-regular-course transactions this interest in speedy handling is not as strong. Moreover, the nature of non-regular-course transactions are such as to provide notice to the parties that they need to inquire about possible defenses before accepting negotiation. Commodity paper is sometimes taken in settlement or payment of a money obligation where the borrower is near-insolvent or its condition is deteriorating. Such a transaction should be presumed to be outside the regular course of business. By contrast, commodity paper is sometimes taken as collateral in regular-course transactions, so the taking of a security interest in commodity paper in itself does not raise the same “red flags” as taking such paper in settlement or payment of a debt.<sup>19</sup>

On balance, the Committee finds the arguments in favor of the uniform provision stronger than the counterarguments in favor of the California non-uniform provision. While the determination as to whether a transaction is in the ordinary course of business will be difficult in some situations, it is necessary in a variety of other contexts to determine whether transactions are in the ordinary or regular course of business, so creditors are not without guidance in making such determinations. The Committee also observes that the exclusion of non-regular-course and settlement and payment transactions has not been a source of extensive litigation in other jurisdictions that adopted PA7, suggesting that the peril for creditors feared by Professors Marsh and Warren has not caused significant difficulty.

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<sup>18</sup> RA7-501, Comment 1.

<sup>19</sup> While disposition of a document of title in satisfaction or settlement of an obligation by a debtor would normally be outside the ordinary course of business, the non-regular-course exception would not ordinarily alter the rights otherwise obtained by a secured party who acquired its security interest in the document through due negotiation. See, e.g., Bank of New York v. Amoco Oil Co. 35 F.3d 643 (2<sup>nd</sup> Cir. 1994); Bluebonnet Warehouse Cooperative v Bankers Trust Company 89 F. 2d 292 (6<sup>th</sup> Cir. 1996)

**B. Committee Recommendation.**

The Committee recommends that RA7-501 be adopted in California. Its adoption is necessary to facilitate the usage of electronic documents of title in California. In addition, adoption of RA7-501 in California would bring California law into harmony with the law of other states as to the requirement that due negotiability requires negotiation in the regular course of business or financing.

**XV. RA7-502, RIGHTS ACQUIRED BY DUE NEGOTIATION.**

**A. Summary and Analysis.**

PA7-502 and CA7502 set forth the effects of due negotiation on the rights of the holder, which resemble those of a holder in due course of an instrument.

A non-uniform change in CA7502 deleted the language in PA7 that set forth the rights conferred on the holder by due negotiation of a delivery order. Adoption of RA7-502(a)(4) would eliminate this non-uniformity.<sup>20</sup>

**B. Committee Recommendation.**

The Committee recommends that RA7-502 be adopted in California.

**XVI. RA7-503, DOCUMENT OF TITLE TO GOODS DEFEATED IN CERTAIN CASES.**

**A. Summary and Analysis.**

Just as a warehouse's lien created by a thief would be ineffective against the rightful owner of the goods, as a general rule, a document of title issued to a thief would be equally ineffective as against the owner of the goods. RA7-503, following PA7-503 and consistent with CA7503, codifies this principle. RA7-503 also codifies the principle, however, that the title of a purchaser of a document of title by due negotiation prevails over the title of the owner or other prior claimant whose rights in the goods preceded issuance of the document if the purchaser's possession of the goods or the document "derived from some act of that claimant which introduced the goods into the stream of commerce or carried them along that stream."<sup>21</sup>

RA7-503(a)(1) and (2) set forth two types of acts of a prior claimant that would give the holder of a document of title, or a person entitled to delivery of the goods covered by it, superior rights in the goods. First, if the prior claimant has delivered or entrusted the goods, or a document of title covering them, to the bailor or his nominee with actual or apparent authority to ship, store or sell the goods or to dispose or obtain delivery of them, the document of title will be effective against the prior claimant. For example, if the owner of goods delivered or entrusted them to a crook and gave the crook actual or apparent authority to ship, store or sell them or

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<sup>20</sup> See the discussion of delivery orders in connection with text discussing RA7-102.

<sup>21</sup> RA7-503, Comment 1.

obtain delivery of them, a purchaser of the document of title from the crook by due negotiation would obtain rights in the goods superior to those of the owner.

The other type of act of the prior claimant that would render an unauthorized document of title effective against him is acquiescence. If the original owner or secured party “acquiesced in the procurement by the bailor or his or her nominee” of a document of title, and the document of title is purchased by due negotiation, such acquiescence – the owner’s or secured party’s omission to act despite the duty to do so - would make the document of title effective against the owner or secured party that acquiesced.

The acquiescence exception in CA7503(1)(b) caused some controversy in California when it was first proposed in 1962. Professors Marsh and Warren strongly criticized it, and it was deleted from §7503 as originally adopted in California. Yet, in 1967 the California legislature amended §7503 to add the language it had deleted and thereby conform the section to PA7. The Committee sees no reason to revisit the issue, which has not resulted in any published cases in California.

Another non-uniform amendment in CA7 was the deletion of PA7-503(b), pertaining to unaccepted delivery orders. Adoption of RA7-503(b), the definition of “document of title” in RA1-201(a)(15), and the definition of “delivery order” in RA7-102 would result in delivery orders being recognized as documents of title in California.<sup>22</sup>

#### **B. Committee Recommendation.**

The Committee recommends adoption of RA7-503 in California.

### **XVII. RA7-507, WARRANTIES ON NEGOTIATION OR TRANSFER.**

#### **A. Summary and Analysis.**

PA7-507 specifies the warranties deemed made by a person, other than one acting merely as an intermediary, that negotiates or transfers a document of title for value. These warranties are that the document is genuine, that the person negotiating or transferring the document has no knowledge of any fact that would impair the document’s validity or worth and that the negotiation or transfer is rightful and fully effective with respect to title to the document and to the goods it represents.

RA7-507 substitutes the term “delivery,” which is defined in Article 1, for the prior term “transfer,” which was not defined in either Article 1 or 7. Together with the proposed amendment of RA1-207’s definition of “delivery”, the change will clarify the circumstances under which such warranties arise in connection with electronic documents of title and can be expected to facilitate their use. RA7-507 carries forward the principle that the warranties provided under §7-507 may be modified by agreement of the parties. RA7-507 also carries forward the principle, also found in PA7-507, that such warranties are in addition to any

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<sup>22</sup> See the discussion of delivery orders in connection with text discussing RA7-102.

warranties made in the underlying transaction in the goods. The provision includes a specific reference to warranties arising from leases with respect to the goods.

**B. Committee Recommendation.**

The Committee recommends that RA7-507 be adopted in California.

**XVIII. RA7-601, LOST, STOLEN OR DESTROYED DOCUMENTS OF TITLE.**

**A. Summary and Analysis.**

CA7601(a) authorizes courts to order compulsory delivery of the goods or compulsory issuance of a substitute document where documents have been lost, stolen or destroyed. Subsection (b) recognizes the legality of the commercial practice of bailees in making delivery of the goods in good faith when they are satisfied that the claimant is the person entitled under a missing (*i.e.* lost, stolen, or destroyed) negotiable document. However, if the bailee acts without a court order, the bailee remains liable on the original negotiable document. To avoid liability for conversion, the bailee may insist that the claimant provide an indemnity bond.

The proposed amendment adds to subsection (a) an exception to the requirement that the claimant under a missing document of title post security in cases where other possible claimants are adequately protected, and in subsection (b), eliminates unnecessary references to tariffs. The purpose of the amendment to subsection (a) is to give the court greater flexibility in deciding whether to require a bond when ordering delivery of goods or issuance of a substitute document of title. The proposal also accommodates the use of electronic documents of title by providing for security against loss caused by “nonsurrender of possession or control” of a document. A comment makes clear that the requirements of RA7-105 govern where reissuance is to be in a different medium from the original.

For what constitutes “adequate protection” the proposal refers to §3-309 of the UCC, the section governing lost, stolen and destroyed instruments. That section provides that adequate protection may be afforded “by any means.” Case law under §3-309 of the UCC indicates that where the circumstances make it unlikely that there will be any adverse claimants to the goods, or where the buyer is a large enterprise and agrees to indemnify any adverse claimants, a court would have the discretion to forego the bond requirement.

**B. Committee Recommendation.**

The Committee recommends adoption of RA7-601. The proposed amendment enhances the court’s flexibility in affording relief to bailees and buyers of goods where documents of title are missing.

**XIX. CONFORMING AMENDMENTS TO ARTICLE 1.**

Amendments to certain of the Article 1 definitions would facilitate the use of electronic documents of title. Many of these amendments were contained in RA1, which to date has not been adopted in California. RA7 contains, in Appendix I, two alternatives, the first of which would be applicable in a jurisdiction that had not adopted RA1, and the second of which would

be applicable in a jurisdiction that had adopted RA1. The discussion below assumes that RA1 is not adopted prior to RA7, and accordingly discusses the first alternative. If RA1 is adopted prior to RA7 in California, the second alternative should be adopted.

**A. Summary and Analysis.**

1. **Bearer.** RA1-201(5) broadens the definition of the term “bearer” to include “a person in control of electronic documents of title.” “Control” is defined in RA7-106 and is relevant to determine whether an electronic document of title has been negotiated or whether a security interest in an electronic document of title has been perfected.

2. **Bill of Lading.** RA1-206(6) defines “bill of lading” as “a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods.” California uses a non-uniform definition of “bill of lading.” The comment to the California statute states that the definition was “enlarged to include freight forwarders’ bills and bills issued by contract carriers as well as those issued by common carriers” such as airlines. To that end, the California statute includes a definition of “airbill” that is not found in the uniform version.

The California statute also limits the definition, however, to “a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and that, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers.” (Non-uniform language underlined). Thus, some documents evidencing receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods that would be “bills of lading” in other states might not qualify as “bills of lading” under the California non-uniform definition.

RA1-206(6) adds language that would cover bills issued by freight forwarders and contract carriers – bills of lading could be issued by “a person engaged in the business of directly or indirectly transporting or forwarding goods.” (Added language underlined.) The problem addressed by California’s non-uniform inclusion of airbills is addressed by that language. It is unclear why there is any need to single out airlines or other common carriers in the definition. Airlines are obviously engaged in the business of transporting or forwarding goods.

There is some justification for continuing to limit the definition of bills of lading to documents that evidence the issuer’s intention that the person entitled under the document has the right to receive, hold and dispose of the document and the goods it covers. For example, if a passenger checks baggage on an airplane or a bus, is the claim check a “bill of lading” in favor of bearer? The Committee recognizes the general principle that an airline or bus should be entitled to restrict the right to claim that baggage to the passenger who checked it in. On the other hand, a definition dependent on the intention of the issuer would invite disputes. In California the risk of such disputes is minimized by the safe harbor provision that a document is a “bill of lading” if those words appear on it, but the policy of RA7 is to avoid such a requirement that an issuer include “magic words” in a document for it to be covered by the Article. Also, preserving the California non-uniform provision would create the possibility that a document would be deemed

a bill of lading in one state yet cease to be a bill of lading when it arrives in California. On balance, the Committee prefers uniformity.

3. **Delivery.** The revision adds to UCC §1-201(14) a definition of “delivery” with respect to an electronic document of title as “voluntary transfer of control.”

4. **Document of Title.** Article 7 depends on the definition of “document of title” to define its scope. Some cases have held that if a document or record is not a “document of title” Article 7 does not apply. The proposed revised definition expands the scope of Article 7 to include electronic documents of title and takes into account alternative technologies. RA1-201(a)(15) defines an “electronic document of title” as follows: “An electronic document of title is evidenced by a record consisting of information *stored in an electronic medium.*” (Emphasis added.) The scope of electronic records covered by UETA is broader— it defines an “electronic record” as “any record created, generated, sent, communicated, received, or stored by electronic means.” Because control of an electronic document of title has greater legal significance in most cases than control of other kinds of electronic records such as contracts, this distinction makes sense.

A non-uniform change in CA1201(15) deleted from the corresponding section of PA7 the reference to delivery orders.<sup>23</sup>

5. **Holder.** The revision amends the definition of “holder” in PA1-201(20) to include “a person in control of a negotiable electronic document of title.”

6. **Warehouse Receipt.** The current California and UCC definitions of “warehouse receipt” in §1-201(45) differ in the same manner as the definitions of “bill of lading” in that California restricts both definitions to documents that “evidenc[e] the intention of the issuer that the person entitled under the document...has the right to receive, hold, and dispose of the document and the goods it covers.” The same analysis applies to the definition of “warehouse receipt” as to the definition of “bill of lading” in UCC §1-201(6) discussed above. The revision also substitutes the phrase “document of title,” defined in RA1-201(15), for the word “receipt.” Using a defined term instead of a term that lacks a statutory definition is better statutory draftsmanship.

## **B. Committee Recommendation.**

The Committee recommends that RA1-201(5), (6), (15), (20) and (45), as set forth in the appropriate alternative of Appendix I to RA7, be adopted in California.

## **XX. CONFORMING AMENDMENTS TO UCC ARTICLE 2.**

### **A. Summary and Analysis.**

Current Division 2 of the CUCC (“CA2) sets forth, in CA2319, the meanings of F.O.B and F.A.S. terms. Subsection (1)(c) sets forth the meaning of the F.O.B. term in certain

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<sup>23</sup> See the discussion of this subject in connection with RA7503, *supra*.

circumstances based on whether the seller has complied with CA2 provisions relating to “the form of” bills of lading. The phrase “on the form” implies a tangible document, which is inconsistent with the concept of medium neutrality reflected elsewhere in RA7. If revisions to Article 2 currently undergoing review are adopted in California, §2319 of the CUCC would be deleted. However, if they are not, the Committee believes that the phrase “on the form” should be stricken from CA §2319.

Other conforming amendments to Article 2 are consistent with the purpose of RA7 to provide for electronic documents of title and are uncontroversial. One issue raised by electronic documents of title is where and when payment is due for the goods if documents of title are delivered electronically to the buyer. When delivery is made by way of tangible documents of title, payment is due at the time when, and place where, the documents of title are delivered unless the goods are shipped under reservation. The conforming amendment to §2-310 provides that when delivery is made by way of documents of title, unless the goods are shipped under reservation, payment is due when the documents are delivered without regard to where the goods are to be received, and that if the documents are electronic, payment is to be made at the seller’s place of business or if none, the seller’s place of residence.

Another conforming amendment, to §2-401, provides that title to the goods passes at the time when an electronic document of title is delivered, but states no rule as to where title passes, while if a document of title is tangible, title passes at the place where the document is delivered. References in §§2-505, 2-509 and 2-705 to “possession” of a document of title are changed to “possession or control,” and in §2-103(3) the definition of “control” in RA7-106 is made applicable to Article 2. References to a “writing” are changed to “record” in §§2-503 and 2-509, and in §§2-104 and 2-503(5)(b) references to a draft “accompanying the documents” are modified to refer to a draft “accompanying or associated with the documents.”

## **B. Committee Recommendation.**

If revisions to Article 2 currently undergoing review are not adopted in California, an additional conforming amendment to CA2319(1), in addition to those proposed in RA7, would be desirable. The following is suggested text for such an amendment:

(1) Unless otherwise agreed the term F.O.B. (which means “free on board”) at a named place, even though used only in connection with the stated price, is a delivery term under which ...

\* \* \*

(c) When under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this division on ~~the form of~~ bills of lading (Section 2323). [Strikeout indicates language to be deleted, and underline indicates added character.]



Other proposed conforming amendments to Article 2 are consistent with the purpose of RA7 to permit electronic documents of title, and the Committee recommends their adoption in California.

**XXI. ADDITION OF REFERENCES TO UCC ARTICLE 2A, AND CONFORMING AMENDMENTS TO UCC ARTICLE 2A.**

**A. Summary and Analysis.**

CA7209, 7503, 7504 and 7509 each include a reference to applicable provisions of CA2. The revisions to these sections contemplated in RA7 include additional references to applicable provisions of Article 2A, which was adopted in California as Division 10 of the CUCC after the enactment of CA7.

PA7-503 and CA7-503 address the priority of rights in the goods subject to a document of title between the holder of the document of title and a person who had a legal interest or a perfected security interest in the goods before the issuance of the document of title. The section articulates the general rule that the person having the prior legal or security interest in the goods prevails. However, this general rule is subject to several exceptions, one of which arises where the person having an interest in the goods delivers or entrusts the goods or a document covering them to a bailor or bailor's nominee with power of disposition under applicable law. PA7-503 and CA7503 cite §§2403 and 9320 of the CUCC as examples of laws giving rise to this power of disposition. RA7-503 would add to this list §§2A-304(2) and 2A-305(2) (§§10304(2) and 10305(2) as adopted in California).

PA7-504 and CA7504 address, among other matters, the rights obtained by a transferee of a non-negotiable document of title. In certain instances, such a transferee's rights may be defeated by creditors of the seller of goods who could treat the transfer as void under §2-402. RA7-504 would include within this class creditors of the transferor of goods who could treat the transfer as void under §2A-308 of the UCC (§10308 as adopted in California).

In addition, PA7-504 and CA7504 provide that a delivery of goods pursuant to a non-negotiable document of title may be stopped by a seller of the goods under §2705. RA7-504 would expand the class of persons who could stop delivery of such goods to include a lessor of the goods under §2A-308 (§10308 as adopted in California).

PA7-509 and CA7509 provide that the question whether a document of title is adequate to fulfill the obligations under a contract for sale or a letter of credit is determined by the governing sales contract or letter of credit. RA7-509 provides additionally that the question of adequacy of a document of title to fulfill the obligations under a contract for lease is determined under Article 2A (Leases) (Division 10 as adopted in California).

PA7-209 addresses the priority between the holder of a warehouseman's lien or security interest and the holder of a perfected security interest in the goods. RA7-209 additionally includes references to Article 2A in a manner virtually identical to the amendment of §7-503 described above.

CUCC §10514 is amended to change a reference to “defects apparent on the face of the documents” to “defect apparent in the documents,” consistent with the purpose of RA7 to permit electronic documents of title. For the same reason, the definitions of “buyer in the ordinary course of business” and “lessee in the ordinary course of business” in CUCC §10103 are modified to refer to “acquiring goods or documents of title” instead of “receiving” them.

**B. Committee Recommendation.**

The Committee recommends that RA7-209, 7-503, 7-504 and 7-509 be adopted in California, modified only by amending the references to Article 2A and Sections thereof to Division 10 and its corresponding sections. These amendments provide references to sections of Article 2A which are analogous to provisions in Article 2 already contained in these sections of existing Division 7.

**XXII. CONFORMING AMENDMENTS TO UCC ARTICLES 4, 5, 8 AND 9.**

**A. Summary and Analysis.**

Various conforming amendments to UCC Articles 4, 5, 8 and 9 are proposed in connection with RA7.

1. **Article 4.** Section 4-201(c) provides for the discontinuation of the security interest of a collecting bank in an item and/or in accompanying documents under certain circumstances, including the relinquishment of possession of the accompanying documents. RA7 would substitute the phrase “possession or control” for the reference to possession alone. The definition of “control” in RA7 §7-106 is made applicable to Article 4 by an amendment to the cross-reference section of §4-104. RA7 also proposes the amendment of the Official Comment to Section 4-501 by adding language confirming that delivery of a document of title, or allowing access to it, is a valid means of presentment, and referencing the revised definition of delivery contained in RA1-201. RA7 also proposes the amendment of the Official Comment to Section 4-503 by adding a provision confirming that upon dishonor of a documentary draft, the bank must return possession or control of the accompanying documents to its principal.

2. **Article 5.** RA7 proposes no statutory changes to Article 5, but proposes certain modifications to the Official Comments to confirm and facilitate the presentation of electronic documents of title under letters of credit.

3. **Article 8.** RA7 proposes the addition of a new subsection (g) to Section 8-103 to make it clear that a document of title held by an intermediary is not covered by the Article 8 rules governing the indirect holding of securities and other “financial assets” unless both the person entitled under the document and the intermediary agree to the contrary. The purpose of this amendment is to prevent the inadvertent application of the Article 8 indirect holding rules to documents of title held by intermediaries.

4. **Article 9.** Several amendments are proposed to Article 9 and the Official Comments to Article 9. These amendments are intended to adapt the rules regarding attachment, perfection and priority of security interests to such interests in electronic documents and to set forth certain duties of a secured party in control of an electronic document. Generally, these

amendments conform the rules for security interests in electronic documents of title to the existing rules for security interests in electronic chattel paper.

For example, in §9-208(b), a new subsection (6) is proposed. This subsection sets forth the duties of a secured party in control of an electronic document of title where there is no outstanding balance due, the secured party is under no duty to make further advances or give value, and the debtor makes a demand for release of the document. The subsection parallels the existing provisions of §9-208(b)(3) regarding electronic chattel paper and raises no substantial new issues.

RA7 proposes a conforming amendment to §9-301, which contains the choice of law rules for perfection, the effect of perfection or nonperfection, and priority of security interests. Section 9-301(1) generally provides that the law of the jurisdiction in which the debtor is located governs perfection, the effect of perfection or nonperfection, and priority of a security interest in collateral. However, §9-301(2) provides that if the security interest is possessory, the law of the jurisdiction where the collateral is located will govern these issues. Another exception in §9-301(3) provides that the law of the jurisdiction where the collateral is located governs, among other matters, the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the certain types of collateral. The conforming amendment limits the applicability of that section to tangible negotiable documents of title, thereby making it clear that electronic documents of title are subject to the general rule that the law of the jurisdiction where the debtor is located will govern these matters. In this respect documents of title are treated in the same fashion as chattel paper; electronic chattel paper is governed by the general rule, and only tangible chattel paper is subject to the exception in §9-301(3).

§9-314 is amended to provide that taking control of an electronic document of title in accordance with RA7-106 is sufficient to perfect a security interest in the document without filing. §9-313, which provided that a secured party may perfect a security interest in a document of title by taking possession of the document, is amended to limit this rule to tangible documents; thus, perfection by possession suffices for tangible documents and perfection by control, for electronic documents. Security interests in documents of title, electronic or tangible, may also be perfected by filing. Comment 2 to §9-314 is amended, in part, by adding a cautionary note, that as to an electronic document of title reissued in tangible form under §7-105, a secured party that is perfected by control should file before relinquishing control in order to maintain continuous perfection in the document.

Other conforming amendments to Article 9 are minor and consistent with the purpose of RA7 to permit documents of title to be in electronic form.

## **B. Committee Recommendation.**

The Committee recommends adoption of the proposed conforming amendments to Articles 4, 5,  
8 and 9.

## APPENDIX I

### SUMMARY CHART OF RECOMMENDATIONS

Section	Recommend Accept	Recommend Reject	Comments
7-102	X		
7-103	X		
7-104	X		
7-105	X		Accepted with added comment
7-106	X		
7-202	X		
7-204	X		
7-206	X		
7-209	X		
7-301	X		Accepted with change
7-302	X		Accepted with correction
7-307	X		
7-403	X		Accepted with modification to comment
7-501	X		
7-502	X		
7-503	X		
7-507	X		
7-601	X		
<u>Conforming Amendments</u>			
Article 1	X		
Article 2	X		Accepted with addition
Article 2A	X		Accepted with modification
Articles 4, 5, 8, 9	X		

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